



C. 343.  
Brief of Gilmore & Somerville

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IN THE SUPREME COURT OF THE UNITED STATES.

No. 343.

October Term, 1898.

CITY OF NEW ORLEANS, PLAINTIFF IN ERROR.

vs.

MARY QUINLAN, DEFENDANT IN ERROR.

On Writ of Error to the United States Circuit Court for the Eastern  
District of Louisiana. Case No. 12,501.

SAML. L. GILMORE,

City Attorney.

W. B. SOMMERVILLE,

Assistant City Attorney; Solicitors and Counsel for Plaintiff in  
Error.

NEW ORLEANS, NOV. 12, 1898.

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## STATEMENT OF CASE.

Mary Quinlan, a citizen of New York, sues the City of New Orleans for \$3135.74, as a non-resident transferee and owner of various certificates of indebtedness issued by the City to its employes; the following being a copy of one of said certificates:

No. 12,430.

\$15.08.

Certificate of Ownership of Appropriation.

Approved June 26th, 1883.

Issued under Ordinance No. 347, C. S.

COMPTROLLER'S OFFICE, CITY OF NEW ORLEANS, }  
NEW ORLEANS, Oct. 14, 1885. }

This is to certify, that under Ordinance 8099, adopted October 24, 1882, the sum of Fifteen  $\frac{15}{100}$  dollars has been appropriated to Jno. Killilea, A. Jarret, transferee, for and on account of street wages, Aug., 1882, and the said named or the bearer hereof shall, upon the surrender of this certificate (and not otherwise) be entitled to receive in the order of the promulgation of said Ordinance, a cash warrant on the treasurer, on any funds in the treasury to the credit of the appropriate fund and not otherwise appropriated.

It is herein specially agreed to by the holder of this certificate that it bears no interest and shall not novate or in any manner affect the nature of the claim against the city under the ordinance referred to, but shall be simply an evidence of transferable ownership thereof, and whenever the ordinance, or that portion of it to which this certificate applies, is paid or cancelled by being tendered and received in payment of taxes when authorized by law, then this certificate shall be surrendered to the office of the Comptroller.

J. V. GUILLOTTE,

Mayor.

BENJ. H. WATKINS,

Comptroller.

The other certificates sued upon are like the foregoing, only changing the names of payees, the amounts to be paid, and the dates of issuance.

The City filed an exception to the jurisdiction of the court, *ratione personæ*, and asked for the dismissal of the case. The exception was overruled, by the following judgment:

Judge Parlange gave the following as his reason for overruling the exception:

In the leading case of *Neugass vs. New Orleans*, 33 F. R. 196, Judge Billings (the circuit judge concurring) held that the proper construction of the first section of act of Congress of March 9, 1887, relative to suits brought by assignees of promissory notes and choses in action, is 'That the Circuit Court shall have no jurisdiction' (of such suits) except over—

1. Suits upon foreign bills of exchange.

2. Suits that might have been prosecuted in such court to recover the said contents, if no assignment or transfer had been made.

3. Suits upon choses in action payable by a corporation.

So that Judge Billings maintained the jurisdiction as to suits on choses in action payable to bearer and made by the City of New Orleans; and he denied the jurisdiction as to suits on choses in action made by the city but requiring assignment (i. e., not payable to bearer).

Judge Billings' construction seems to have been followed without dissent. *Rollins vs. Chaffe*, 34 F. R. 91; *Laird vs. Indemnity Assurance Company*, 44 F. R. 712; *Justice Miller in Wilson vs. Knox Company*, 43 F. R. 481; *Bank vs. Barling*, 46 F. R. 357; *Thompson vs. Searcy Company (C. C. A.)*, 57 F. R. 1030; *Nelson vs. Eaton (C. C. A.)*, 66 F. R. 377.

Benjamin vs. New Orleans, 153 U. S. 411, was a suit upon warrants payable 'to the order of A. B.' and others simply stating that the Metropolitan Police Board was 'indebted to C. D.' See warrants, page 419, 153 U. S.

While the warrants in the Benjamin case were choses in action made by a corporation, as they were not payable to bearer, the Supreme Court properly held (153 U. S. 433) that to sue upon them the assignor must bring himself within Judge Billings' class 2, i. e., he must allege that the assignees could have sued.

The case proceeded regularly to trial, and final judgment was rendered in favor of Miss Mary Quinlan, and against the City of New Orleans, for \$2635.74, payable out of the revenues of the year 1892.

The City excepted that Miss Mary Quinlan's petition contained no averment that this suit could have been maintained by the assignors of the claims or certificates sued upon by her, and which form the basis of this action. The errors assigned being :

That the plaintiff seeks to recover upon certificates issued by the City of New Orleans, of which said plaintiff is assignee of the city employes to whom said certificates originally issued, and that she acquired same from such employes; that said certificates are all payable to the person, the employe of the City, to whom they originally issued, a copy of one of said instruments being annexed to this assignment; that the plaintiff seeks to recover as assignee of debts on the pay rolls of the City of New Orleans, due employes of the said City, all citizens of Louisiana, for their services as street cleaners, etc., and assigned by them; and it thus appearing that the suit is brought substantially and in effect by plaintiff as assignee of written instruments, i. e., time certificates drawn to order, all said certificates and debts being choses in action; under the law there being no jurisdiction in this Court of suits by assignees of such choses in action, as those sued on by plaintiff, without averment and proof that the assignors thereof could have sued if no assignment had been made, and there being no such averment in the petition and supplemental petitions, and the fact being that the assignors could not have sued in this

Court, all citizens of Louisiana, and there being no jurisdiction in this Court, to decree payment of the amount of \$2635.74 to the parties, all citizens of Louisiana, it results that in all aspects the United States Circuit Court had no jurisdiction to entertain the suit or render the decree herein sought to be reversed, and the Court erred in not sustaining, but on the contrary overruling and dismissing the exception filed by the City of New Orleans, on the grounds herein assigned and in the exception.

The City, in its answer, put clearly at issue its liability to the original payees of the certificates sued upon; these certificates, being non-negotiable choses in action, the contest over them was between the City of New Orleans and the original payees of said certificates, residents of Louisiana, and the contest is therefore between citizens of the same State, and not of different States. The certificates, on their face, declare that they "shall not novate or in any manner affect the value of the claim against the city under the ordinance referred to, but shall be simply an evidence of transferable ownership thereof."

The City, plaintiff in error, stands on its plea to the jurisdiction of the Circuit Court, and asks for a reversal of the judgment of that Court, and that the dismissal of the case be ordered for want of jurisdiction in the court *a qua*. *United States vs. Jahn*, 155 U. S. 109.

#### ARGUMENT.

The certificates sued upon are non-negotiable instruments. *City vs. Strauss*, 25 (La.) Ann. 50; *Wall vs. County of Monroe*, 103 U. S. 75; *District of Columbia vs. Cornell*, 103 U. S. 661; *Mayor vs. Ray*, 19 Wall. 468; *Claiborne Co. vs. Brooks*, 111 U. S. 409.

In *Wall vs. County of Monroe*, 103 U. S. 75, the Court held that city scrip issued to bearer, like that involved in this case, could not be sued upon in the Federal Courts by a non-resident transferee. The Court say:

The following is a copy of one of them (warrants). The others are of like tenor and effect, though some of them are for only \$20:

\$50)

(No. 804.

The treasurer of the county of Monroe will pay to Frank Gallagher or *bearer* the sum of \$50, out of any money in the treasury for general county purposes, and not otherwise appropriated.

Given under my hand, at office, in Clarendon, Ark., this 15th day of September, 1875.

W. S. DUNLAP, *Clerk*.

\* \* \* The new warrants were purchased in good faith for a valuable consideration by the plaintiff, who, on the refusal of the treasurer to pay them on demand, instituted this action. \* \* \*

*Mr. Justice Field* delivered the opinion of the Court. The warrants in suit are evidences of indebtedness by the county of Monroe, issued by that branch of its government to which is intrusted, by the laws of the State, the examination and approval of claims against the county. They are orders upon the treasurer of the county to pay out of its funds for county purposes, not otherwise appropriated, the amounts specified. \* \* \*

The Court, speaking through *Mr. Justice Bradley*, said: Vouchers for money due certificates of indebtedness for services rendered, or for property furnished for the uses of the city, orders or drafts drawn by one city officer upon another, or any other device of the kind, used for liquidating the amounts legitimately due to public creditors, are, of course, necessary instruments for carrying on the machinery of municipal administration, and for anticipating the collection of taxes. But to invest such documents with the character and incidents of commercial paper, so as to render them in the hands of *bona fide* holders absolute obligations to pay, however irregularly or fraudulently issued, is an abuse of their true character and purpose. And again: Every holder of a city order or certificate knows that, to be valid and genuine at all, it must have been issued as a voucher for city indebtedness. It could not be lawfully issued for any other purpose. He must take it therefore, subject to the risk that it has been lawfully and properly issued. His claim to be a *bona fide* holder will always be subject to this qualification. The face of the paper itself is notice to him that its validity depends upon the regularity of its issue. The officers of the city have no authority to issue it for any illegal or improper purpose, and their acts can not create an estoppel against the city itself, its taxpayers or people. Persons receiving it from them know whether it is issued, and whether they receive it for a proper purpose and a proper consideration. Of course they are affected by the absence

of these essential ingredients; and all subsequent holders take *cum onere*, and are affected by the same defect. These observations apply equally to the county warrants in suit, as to the city warrants there considered. And the same reasons which deny to them negotiability in the sense of the law merchant, allow any matter of set-off to them which the county held against the original parties.

\* \* \* No Court of Arkansas has held that they were *negotiable* in the sense of the law merchant, so as to shut out, in the hands of a *bona fide* purchaser, inquiries as to their validity, or *preclude defences which could be made to them in the hands of the original parties*. The law is not different there from that which obtains in other States.

But, the Judge *a quo* holds to the contrary; and follows the decision of Judge Billings in *Neugass vs. New Orleans*, 33 F. R. 196. Judge Billings also maintained the jurisdiction of his court in *New Orleans vs. Benjamin*, which was also a suit on choses in action issued by a municipal corporation, and the Court reversed the judgment of Judge Billings, and ordered the dismissal of the suit for want of jurisdiction in the Federal Courts. 153 U. S. 432.

The decision in *Wall vs. County of Monroe*, 103 U. S. 75, was rendered under the judiciary act of March 3, 1875.

Has the jurisdiction of the Circuit Courts been since enlarged, and has the Circuit Court jurisdiction in this case? As it is a court of limited jurisdiction, it has not, unless such enlarged jurisdiction is conferred by Act of March 3, 1887, as amended by Act of August 13, 1888, which, in part, is as follows:

\* \* Nor shall any Circuit or District Court have cognizance of any suit, except on foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made. \* \* \* 25 St. 434.

It is contended that the foregoing act confers jurisdiction upon the Circuit Courts, in suits upon city time certificates made payable to bearer, because they appear to be issued by a

corporation, a municipal corporation. The city, the plaintiff in error, holds to the contrary. The object of the Act of 1887 was to amend certain sections of the Act of March 3, 1875. It was not only to amend, but it was to restrict the jurisdiction of the Circuit Courts, as defined in the Act of 1875. The jurisdiction was being stolen by A B transferring to C D negotiable paper for the purposes of suit only, and the Circuit Courts were being overcrowded with work which they were never designed to do. Mr. Culbertson, Chairman of the Judiciary Committee, in introducing the bill of 1887 and 1888, said, in part, by way of explanation.

\* \* \* \* \* The object of the bill is to *diminish the jurisdiction of the Circuit Courts* and the Supreme Court of the United States, to promote the convenience of the people, and to lessen the burden and expense of litigation. The methods employed by the bill are, first, to raise the minimum amount, giving the Circuit Courts jurisdiction from \$500 to \$2000. In the second place we propose to take away from the Circuit Courts of the United States all jurisdiction of controversies between the assignees of promissory notes and the makers thereof, unless suit could have been maintained in such courts had no assignment been made. In the next place, the bill proposes to take away wholly from the Circuit Courts the jurisdiction now exercised by them over controversies in which one of the parties is a corporation organized under the laws of one State and doing business in another State. We propose to provide that the Circuit Courts shall have no jurisdiction over controversies of that sort; that whenever a corporation organized under the laws of one State shall carry on its business in another State, the corporation shall, for judicial purposes, be considered as a citizen of the State in which it is carrying on business.

\* \* \* \* \* *This embodies, substantially, all the changes in the act.* The effect of these changes I beg to refer to for a moment. The minimum jurisdiction of \$500 was placed in the original judiciary act in 1789, and it has been the law ever since. The population of the country then was 4,000,000, and now is over 54,000,000. The amount of business of the country in the courts then and now sustain no comparison whatever.

The next proposition is to deny the right of an assignee of a promissory note to bring suit in a Federal Court. That was the law from 1789 until 1875. For ninety years

the assignee of a promissory note, or any other chose in action, could not bring suit in a Federal Court, unless a suit could have been maintained had no assignment been made.

The increase of jurisdiction of the Circuit Courts of the United States, from that change of law in 1875, has multiplied the business in that court enormously, while it diminishes the business in the Circuit Courts, which are overloaded everywhere now. It also diminishes the business in the Supreme Court of the United States, which is three years behind upon its docket.

\* \* \* The other proposition is to take away from the Circuit Courts of the United States jurisdiction over controversies between corporations created by the laws of a State, and which go into other States and open offices and carry on business. For judicial purposes we make such corporations citizens of that State, and compel them to sue in the forum, or in the courts of the State in which they carry on their business. Over one-third of the business now in the Circuit Courts of the United States and in the Supreme Court of the United States spring from this very jurisdiction to which I call your attention (*Cong. Record*, Vol. 18, Part 1, p. 613; 49th Cong., 2d Sess.).

Mr. Edmunds said, in discussing the bill in the Senate: In this state of things, and wishing myself to diminish the wrong and inconvenience that exist in regard to what is now a national jurisdiction, I was willing to agree to this report. It contains one or two things of small importance and of temporary operation that I should entirely disagree to if they were separate propositions, but the general benefit of the bill, if we correctly understand it, will be greatly to the interest of the people who have merely local controversies with corporations, and so on, that ought fairly to be tried in the local tribunals just as if they were the citizens of the same State (*Cong. Record*, Vol. 18, Part 3, p. 2544; 49th Cong., 2d Sess.).

The object of the Act of 1888 is thus made plain. It is to diminish the jurisdiction of the Circuit Courts. "*For ninety years the assignee of a promissory note, or any other chose in action, could not bring suit in a Federal Court, unless a suit could have been maintained had no assignment been made.*" Miss Quinlan would not have attempted, under the judiciary acts of 1789 and 1875, to bring this suit in the Federal Courts, upon a chose in action, transferred to her by a citizen of the State of

Louisiana; yet, under the Act of 1887, which act is designed to limit the jurisdiction, she filed this suit in the Federal Court of said State.

The views of Mr. Culbertson and of Mr. Edmunds, as to the extent and intent of the Act of 1887 and 1888, are also the views of Mr. Justice Miller of the Court, as set forth in *Wilson vs. Knox Co.*, 43 Fed. Rep. 482; he says:

\* \* \* The construction would extend the jurisdiction of the Federal Courts, without any apparent reason, over a class of suits by assignees of choses in action, never before within their jurisdiction, whereas the main purpose of the Act of 1887 seems to have been to curtail their jurisdiction. The general rule enunciated by the statute is that the Federal Courts shall not have jurisdiction of a suit by an assignee "of a promissory note or other chose in action," when the assignor could not maintain such a suit. The clause, "if such instrument be payable to bearer and be not made by any corporation," operates as an exception to the general rule, and gives the Federal Courts jurisdiction of those suits by assignees where the action is founded on an obligation, made by a corporation, that is payable to bearer, and is negotiable by mere delivery. In the light of previous legislation on the subject our view is that Congress intended by Act of March 3d, 1887, to prohibit suits in the Federal Court by assignees of choses in action, unless the original assignor was entitled to maintain the suit, in all cases except suits on foreign bills of exchange, and except suits on promissory notes made payable to bearer and executed by a corporation. Construed in this way, the Act of 1887 operates to restrict to some extent the jurisdiction exercised under the Act of March 3, 1875, which was probably the intention of the law-maker.

The certificates sued upon by Miss Quinlan are not "promissory notes made payable to bearer and executed by a corporation." They are not even negotiable instruments under the law merchant and the law of Louisiana. *City vs. Strauss*, 25 (La.) Ann., 50. They certify on their face that they are mere "certificates of ownership," and that said certificate "shall not novate or in any manner affect the nature of the claim against the city under the ordinance referred to, but shall be simply an evidence of transferable ownership thereof." Although the certificates

were made payable to A, B or bearer, they are non-negotiable instruments, and all the equities between the city, a department of the State, and its employes are preserved. A suit upon these certificates means a trial upon any issue which might be presented by the city against its employe or the original payee. *City vs. Strauss*, 25 (La.) Ann. 50.

The judiciary Act of 1875 is entitled an act "to determine the jurisdiction of circuit courts," etc. *To determine* is "to limit," "to ascertain definitely," (Webster's Dictionary) the jurisdiction of circuit courts; and the title of the Act of 1887-1888 is:

"To amend sections one, two, three and ten of an act to determine the jurisdiction of the Circuit Courts of the United States, and to regulate the removal of causes from the State courts, and for other purposes, approved March third, eighteen hundred and seventy-five." *United States Statutes At Large*, 50th Congress, 1887-1889, Vol, 25, p. 434.

And, it has been seen, in the remarks of Mr. Culbertson in the House and of Mr. Edmunds in the Senate, that the object of the Act of 1887 was to *diminish* the jurisdiction of the Circuit Courts. And Mr. Justice Miller also found that the object of the act was to diminish that jurisdiction. Had the Congress in 1887-88 intended to *increase* that jurisdiction, as found by the judge *a quo*, and confer jurisdiction upon the Federal Courts in suits on non-negotiable instruments issued to bearer by a corporation, it is submitted, it would have said so affirmatively. It would never have attempted to confer jurisdiction in such negative language as:

Nor shall any Circuit or District Court have cognizance of any suit \* \* \* to recover the contents of any promissory note or other chose in action in favor of any assignee, \* \* \* if such instrument be payable to bearer, and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made.

The reasons for giving the Federal Courts jurisdiction of suits by assignees, where actions sound in the obligations of corporations payable to bearer, and which are *negotiable by delivery*, and for denying the jurisdiction, where the chose in ac-

tion is like the certificate herein involved, *not a negotiable instrument*, lie upon the surface. The reasons in question are to be met with everywhere in *Ray vs. Mayor*. They involve considerations of general good and of public policy. Municipal corporations are local governments, in the interest of peace, good order, and the general well being of political society. To invest municipal scrip with the character of negotiable commercial paper would be an abuse of its true character, and expose political communities to the dangers of bankruptcy by putting them in the power of corrupt officials.

There are cases, however, where the general interest, and especially the public faith, demand that municipal securities be allowed the same privileges with negotiable instruments. As, however, the cases referred to constitute an exception to the general rule of law, it must appear that they have been clearly provided for. In the absence of clear provision in that behalf they are not to be considered in the light of negotiable instruments. The judiciary Act of 1887, as amended in 1888, showed the unwillingness of the Congress to allow the same access to the Federal Courts for suits against corporations where the instrument proceeded on is negotiable, and where it is not, and Congress realized the necessity of relieving the overburdened dockets of the Courts; but declined, at the same time, whatever the pressure of business might be, to interfere at all with proceedings upon negotiable instruments made payable to bearer and issued by a corporation. When the Act of 1887 prohibited these Courts from exercising jurisdiction in controversies upon obligations not made by any corporation, it evidently did not, either expressly, or by clear implication, thereby grant the power to enforce payment against municipal governments of their non-negotiable scrip where recovery could not have been had by the original holder.

In "determining," or "defining," or "limiting" the jurisdiction of the Federal courts the Congress, it is submitted, did not confer jurisdiction by implication. To say that the Federal courts shall not have jurisdiction, except the indebtedness sued upon

be issued by a corporation, is not equivalent to saying that the Federal courts shall have jurisdiction in any case. Federal courts are statutory courts, of limited jurisdiction, and that jurisdiction must be specifically conferred.

The judge *a quo* says that the judgment of Judge Billings in the *Neugass* case, 33 F. R. 196, maintaining the jurisdiction of the Circuit Court of the United States in a similar case to this, has been followed in a list of cases mentioned by him. The *Neugass* case embraced two kinds of warrants issued by the City of New Orleans. Those warrants held by Mr. Neugass were made payable to A, B *or order*, and Mr. Neugass' suit was dismissed for want of jurisdiction. Mr. Stewart, a co-plaintiff in that suit, held warrants issued to A, B *or bearer*, and jurisdiction over Mr. Stewart's suit was maintained. It was the ruling of Judge Billings—dismissing the *Neugass* suit for want of jurisdiction—which was approved in two of the cases mentioned by the judge *a quo*: *Wilson vs. Knox Co.*, 43 F. R. 481, and *Laird vs. Indemnity Mutual Marine Assurance Co.*, 44 F. R. 712. In *Bank of British North America vs. Barling*, 46 F. R. 357, the suit was on negotiable instruments, and not on non-negotiable instruments. In *Nelson vs. Eaton*, 66 F. R. 376, the mortgage note sued upon was made payable to a non-resident. The *Neugass* case appears to have been twice followed: in *Rollins vs. Chaffee Co.*, a Colorado case, 34 F. R. 91, and in *Thompson vs. Searcy Co.*, an Arkansas case, 57 F. R. 1030; but, it is submitted, had the *Neugass* case been appealed the decision therein would have been reversed for the same reason that Judge Billings was reversed in the *Benjamin* case. 153 U. S. 432. In that case the Court say :

In our judgment the pleadings show a suit to recover the contents of choses in action, and, as the bill contained no averment that it could have been maintained by the assignors if no assignments had been made (from the statement accompanying the certificate it appears affirmatively that it could not), the jurisdiction of the Circuit Court cannot be sustained on the ground of diverse citizenship.

Not only is there nothing in the Act of 1887, as amended in 1888, which confers jurisdiction on the Circuit Court in this case, but the Constitution, Art. III, sec. 2, confines the jurisdiction to "controversies between citizens of different States," *etc.* Now, the controversy here is not between Miss Quinlan and the City of New Orleans; it is between the City and its employes. The City has the right, on being sued upon these non-negotiable certificates, to controvert, not only the liability of the City, as stated in the certificates, but to plead compensation, or forfeiture, or any defense whatsoever against its employes, and original payees. The controversy is essentially and exclusively between the City and its employes, no matter who the holder of the certificates or nominal plaintiff in the case may be, and therefore not between citizens of different States.

The judgment of the lower court should be reversed, and the suit be dismissed.

Respectfully submitted,

SAM'L L. GILMORE,

*City Attorney,*

W. B. SOMMERVILLE,

*Assistant City Attorney; Solicitors and Counsel for Plaintiff in Error.*

NEW ORLEANS, NOV. 12, 1898.

*W.B. Somerville  
of counsel*